In the Supreme Court of the United States

OCTOBER TERM, 1897.

No. 177.

HOSMER B. PARSONS, PLAINTIFF IN ERROR,

vs.

THE DISTRICT OF COLUMBIA ET AL.

BRIEF FOR PLAINTIFF IN ERROR.

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STATEMENT OF FACTS.

Mr. Parsons owns a considerable tract of unimproved land upon Brightwood avenue, in the District of Columbia. It is without the city limits, and is of irregular shape. In August, 1895, the Commissioners of the District of Columbia caused to be laid on said Brightwood avenue, from Military road to Aspen street and to Flint street a 12-inch water main, and assessed Parsons' land therefor at the rate of $1.25 for each linear foot abutting on one side of said avenue, or $372.50 in all. The land abutting on the opposite side of the avenue was also assessed at the same rate, making a total assessment of $2.50 per foot.

The total cost of this main to the District of Columbia, as shown by the report of the Engineer Commissioner (Rec. 5), was $1.50 per foot, making a profit of $1.00 per foot for the District. As there were (Rec. 6), in all, 7,147 feet of 12-inch main laid at this one time, the District made $7,147 thereon. The same report shows that the total cost of the 6-inch main contemplated would be 90 cents per foot (Rec. 5), and the

assessment for this (Rec. 7) was made at the same rate of $2.50 per foot for both sides of the street, making a profit of $1.60 per foot, or $4,724.40 for the total length (2,952½ feet) of 6-inch main laid at that time and place. So that the District of Columbia is to take as profit from the pockets of the taxpayers, on this single transaction, the respectable sum of $11,871.40 over and above all expenses.

Having laid the main, the respondents proceeded, on August 10, 1895, to make an assessment therefor, and produced the document found on page 7 of the Record, wherein Mr. Parsons' land is described as lot "part," and is called on by that name to pay $872.50.

Respondents then caused a notice of assessment, in Mr. Parsons' name, to be mailed to A. M. Bliss, Esq., Overlook Inn, D. C.

This notice was in substance only a demand for payment, and was the *only notice given him at any time.*

Plaintiff in error filed his petition *in certiorari* to quash the above-described assessment against his land upon the grounds stated therein. The lower court refused to annul the assessments, and dismissed the petition.

THE STATUTES.

Sec. 204, Rev. Stat. D. C., provides—

> "On petition of the owners of the majority of real estate on any square or line of squares in the city of Washington, water pipes may be laid and fire plugs and hydrants erected whenever the same may be requisite and necessary for public convenience, security from fire, or for health."

The Act of the Legislative Assembly of June 23, 1873, declares:

> "Sec. 6. That hereafter, in order to defray the expense of laying water mains and the erection of fire

plugs, there be and is hereby levied a special tax of one and a quarter cents per square foot on every lot and part of lot which binds in or touches on any avenue, street or alley in which a main water pipe may hereafter be laid and fire plugs erected, which tax shall be assessed by the Water Registrar within thirty days after such water mains and fire plugs shall have been laid and erected, of which assessments the Water Registrar shall immediately notify the owner or agent of the property chargeable therewith, setting forth in said notice the number of the square in which is situated the property on which said tax is assessed, and the street, avenue or alley on which it fronts; and the said tax shall be due and payable in four equal instalments, the first of which shall be payable within thirty days from the date of the notice," etc.

By Act of Congress of June 17, 1890, it was provided that—

> "The Commissioners shall have the power to lay water mains and water pipes and erect fire plugs and hydrants whenever the same shall be, in their judgment, necessary for the public safety, comfort or health."

By Act of Congress of August 11, 1894, it was enacted that assessments for water mains should thereafter be at the rate of one dollar and twenty-five cents per linear front foot against all lots or land abutting upon the street, road or alley in which a water main should be laid.

ASSIGNMENTS OF ERROR.

We submit that the court erred—

1. In holding the Act of the Legislature of June 23, 1873, and the Act of Congress of August 11th, 1894, to be constitutional and valid.

2. In holding that the petitioner was not entitled under the Constitution to notice of the charge against him before it became a lien upon his land.

3. In holding that the petitioner was not entitled under the Constitution to an opportunity to be heard as to the cost, utility, and benefit to him of the proposed work, and as to the apportionment of the assessment therefor before said assessment was finally made.

4. In holding that the charge against petitioner's land of a sum in excess of the cost of the work was not in violation of his constitutional rights.

ARGUMENT.

The Act of the Legislative Assembly of 1873, with its amendments by Congress, and the Act of Congress of August, 1894, are in violation of those parts of the Fifth Amendment to the Constitution of the United States which declare that no person shall be deprived of property without due process of law, nor shall private property be taken for public use without just compensation, because:—

a. They do not provide for notice to the owner of land to be assessed, nor give him any opportunity to be heard as to the advisability of the improvements to be made, or to the cost of the same, or the benefit to his land, or the apportionment of the tax, nor do the acts provide for an appeal from, or review of, the assessment in any manner.

b. The assessment called for by the acts is not based on benefits to the property assessed, but it is to be made without regard to benefits.

c. The assessment is not based upon the cost or even the character of the work, but is to be the same, regardless of cost, of material or size of main.

d. The law upon which the assessment rests provides for the levy on private property of a tax, part of which is to be devoted to public use.

I.

The Want of Provision for Notice.

In any case where proceedings are to be had for the taking of property, or to impose a burden upon it, the *statute itself* must provide for notice to the property owner; otherwise it is unconstitutional.

> Ulman *vs.* Mayor, &c., 72 Md. 587, affirmed in this court. See 165 U. S. 587.
>
> Garvin *vs.* Daussman, 114 Ind. 429.

Lewis, on Eminent Domain, says (Sec. 368):

> "There is really but one logical and consistent position in the matter, and that is that a statute which does not provide for notice is invalid."

And in Welty, on Assessments (pp. 286–408), we find:

> "If the law makes no provision for a hearing of objections to the assessment, it is within the rule which prohibits the taking of property without compensation, and is in direct conflict with the 14th Amendment of the Constitution."

To precisely the same effect is Gatch *vs.* Des Moines (Ia.), 18 N. W. Rep. 310.

The necessity of notice to the property owner in a proceeding like this would seem to have been settled in the District of Columbia, by the case of Allman *vs.* D. C., where, in construing a special assessment law, the court said:

> "The fatal defect in the act and the proceedings thereunder is the failure to provide for notice to the owners of property, *and an opportunity to them to be heard* before the final settlement of the charge and the lien therefor upon their property. A proceeding which fastens a lien upon property for which it may be summarily sold without notice and an opportunity given to the owner to be heard as regards its validity

> and fairness is not 'due process of law;' and this notice must be given at some serviceable stage of the proceedings."
>
> Allman *vs.* D. C., 3 App. Cas. (D. C.) 8, and cases cited.

The requirement of a provision in the statute for notice before a special assessment may become fixed or effectual has repeatedly been declared by this court. In Davidson *vs.* New Orleans, 96 U. S. 97, where an assessment for draining swamps was in question, the court laid down the proposition—

> "that whenever by the laws of a State, or by State authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole State or of some more limited portion of the community, *and those laws provide for a mode of confirming or contesting the charge thus imposed*, in the ordinary courts of justice, *with such notice to the person*, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment cannot be said to deprive the owner of his property without due process of law."

To the same effect are:

> Hagar *vs.* Reclamation Dist., 111 U. S. 701.
>
> Spencer *vs.* Merchant, 125 U. S. 345.
>
> Palmer *vs.* McMahon, 133 U. S. 660.
>
> Paulson *vs.* City of Portland, 149 U. S. 30.
>
> Street Extension Cases, Wash. Law Reporter of June 10, 1897, p. 372.

Other authorities have used even more vigorous language in upholding the citizen's right to notice.

In the well known and widely approved case of Stuart *vs.* Palmer, 74 N. Y. 189, the court said:

> "The legislature can no more arbitrarily impose an assessment for which property may be taken and

> sold than it can render judgment against a person without a hearing. It is a rule founded on the first principles of natural justice—older than written constitutions—that a citizen shall not be deprived of life, liberty, or property without an opportunity to be heard in defense of his rights."

And again:

> "I am of opinion that the Constitution sanctions no law imposing such an assessment without a notice to, and a hearing, or an opportunity of hearing, by the owners of the property to be assessed."

This language has been quoted with approval in many cases. (See dissent of Mr. Justice Matthews in Spencer *vs.* Merchant, *supra.*)

In the Ulman Case, in Maryland, already cited, the court said:

> "The entire proceeding, beginning with the act, . . . was purely *ex parte.* No opportunity whatever was given to resist this exaction either by allowing a hearing before the imposition of the tax, or by providing for an appeal to a court of law afterward. The first process served upon the citizen was a peremptory demand for the payment of a burdensome lien—a judgment *in rem* and *in personam*—imposed . . . without summons or notice or warning, and without even an opportunity to appeal. If this be due process of law, the provisions of the Federal and State constitutions and of *Magna Charta* itself are utterly meaningless and vain."

And the judgment holding the ordinance in question in that case to be void for want of provision for notice was here affirmed.

> Mayor *vs.* Ulman, 165 U. S. 719.

It may be claimed here, as was done by counsel in the court below, that nothing Mr. Parsons might have done had notice been given him would have affected the proceeding,

and notice being therefore useless, it was not required. The same argument was urged on the Maryland court. I quote from the syllabus of the reported decision:

> "The right to have notice to appear and be heard before such tax is imposed is an *absolute right*, not to be invaded under any pretext whatever, *and the fact that the tax would have been the same if the property owner had appeared and been heard does not make it legal.*"

It would seem that the affirmance of that decision by this court should foreclose further discussion of the subject.

THE STATUTE ARBITRARY AS TO BENEFITS.

It is fundamental law, endorsed by all authorities, that assessments for local improvements can be justified only upon the theory that the lands upon which they are laid are *specially benefited;* "the enhancement in value being the consideration for the charge"; (147 U. S. 202), and if a law should authorize such assessments to be laid without regard to benefits, it would either take property for the public without compensation, or take property from one person for the benefit of another, and in either aspect it would be unconstitutional.

Stuart *vs.* Palmer, 74 N. Y. 189.
Railroad *vs.* City of Decatur, 147 U. S. 198.
Dyar *vs.* Farmington, 70 Me. 527.
Allman *vs.* D. C., above cited.
State *vs.* Cunningham, 29 Minn. 62.
Johnson *vs.* City, 40 Wis. 315.
Wewell *vs.* City, 45 Ohio St. 424.
Schumacker *vs.* Toberman, 56 Cal. 510.

By special benefits is not meant the usual advantages to the public derived from an improvement, but benefits which exceed the general benefits to the public, and which are

present and accrue immediately from the construction of the work.

> Mittell *vs.* City, 9 Ill. App. 534.
> Railroad Co. *vs.* City, 37 N. J. L. 330.
> The Street Extension Cases, *supra.*

And the assessment must not only be on the basis of benefits to the land assessed, but strictly in proportion to such benefits.

> "It is well settled that the property to be benefited may be assessed only in proportion to the benefits received. This rule has received the sanction of the courts too long to be disturbed."
>
> White *vs.* Saginaw, 67 Mich. 40.

The usual method of arriving at the benefits conferred by an improvement is to have the land and the work viewed by a duly authorized commission, who can make a fair estimate of the gain to the land owner. The question of benefits is necessarily a question of fact. It is not contended that the legislature has not the power to investigate the question for itself with reference to a certain improvement and decide it. Undoubtedly the legislature may do this. But this was not done in the case of the statute here under discussion, and we submit that if it had been done when the act was passed, in 1873, such a decision could not be held applicable to improvements made twenty years later, when the prices of labor and of material, as well as other conditions, have changed.

It is sometimes said—doubtless it will be claimed here—that the mere statement by the legislature of the amount or rate of assessment to be levied is presumptive evidence that the question of benefits was considered, and is conclusive of the fact that the property assessed is benefited to the extent of the assessment.

But, evidently, this can be so only when the legislature

had in mind *a certain specified improvement* under *ascertained conditions*. Every case cited on the point shows this fact. The case of Spencer *vs.* Merchant, so much relied on by the defendants, shows it. But, in our case, the law imposes the same rate of $1.25 per foot, whether a 12-inch or a 6-inch water main be laid; whether it is made of iron or terra cotta; whether it is put down before a row of city houses for immediate use by them, or in suburban fields and farms, with an eye to the dim future. In the last-mentioned instance—and such actually often occur in the District—there is absolutely no benefit to the land. The owner cannot use the water main, and does not want it.

Also, many mains are laid in territory where lateral connections for drawing off the water are not contemplated, and no provision is made for them, so that it is impossible for the abutting land owner to use the water, even if he would. Not only this, but in the larger mains, such as the 48-inch, lateral taps are not allowed under any circumstances, so that the citizen may be compelled to pay for a main which he is not permitted to benefit by. It may be claimed that the District will not take advantage of its citizens in this manner; but this would be only forbearance on its part, and does not answer the objection to a law which allows such an injustice.

When these things are borne in mind it cannot be believed that either the Legislative Assembly, in 1873, or Congress, in 1894, considered the question of benefits, or that that question is settled by the mere insertion in the law of an arbitrary rate of assessment.

> See Cooley on Taxation, pp. 459, 460, 489 and 493 *et seq.*

When we consider that, under the law in question, the citizens whose lands abut on a 6-inch water main, costing the District 90 cents a foot (Rec. 5), are compelled to pay for it $2.50 a foot, there can be little chance of error in call-

ing this "a grossly and palpably unjust and oppressive assessment."

> See Mayor *vs.* Johns Hopkins Hosp., 56 Md. 1 (the dissenting opinion in which was afterward accepted by the court in 72 Md. 587).

In the case of Craighill et al. *vs.* Van Riswick, 8 App. D. C. 185, the decision against certain special assessments was partly based on the ground that the law in question allowed the United States the benefit of a very profitable speculation; that the Government might receive $1,800,000 in return for an outlay of $1,200,000, and the court said:

> "Such a result would be shocking to our sense of natural justice, to all our ideas of constitutional guaranty, and to our whole theory of governmental propriety."

If a profit from the citizen to the Government of fifty per cent. is shocking to one's sense of justice, how much more so the profit realized by the District from its water mains—a profit, often reaching, as has been shown, to nearly two hundred per cent.

If this law can be sustained, no bounds can be set to legislative avarice. Such power in the legislature has been styled "an unlimited power to plunder the citizen."

> Cooley on Taxation, p. 68.
>
> City of Bloomington *vs.* Railroad, 134 Ill. 460.

If special assessments stand for their validity upon the doctrine of special benefits (147 U. S. 198) what justification can be found for a proceeding which declares under authority of a statute twenty years old, *and without inquiry or investigation by the legislature or otherwise* that all lands shall bear precisely the same proportionate charge?

> "But whether such improvement does or does not benefit it (the property) is essentially a judicial ques-

tion upon which the property owner is entitled to notice and a hearing."

Elliott on Roads and Streets, p. 397.
Barber Co. *vs.* Edgerton, 125 Ind. 465.
Ulman *vs.* Mayor, 72 Md. 587.

The Court of Appeals on this proposition justified its rulings by the decision of this court in Spencer *vs.* Merchant, 125 U. S. We still think that case should not control this for three reasons.

First. It was a case of a special tax on certain specified lots of land, benefited by a certain improvement, and not a question under a general assessment law.

Second. The improvement had been made, its cost ascertained, and the benefits to property passed upon, so that the legislature was not proceeding blindly to fix an arbitrary tax.

Third. Opportunity was actually given the property owner to be heard as to the apportionment of the tax among the lots benefited—that is, as to how much he should pay.

Under the statute in the case at bar, the owner is not to be heard at all on any question.

That case (Spencer *vs.* Merchant) is cited and construed in Palmer *vs.* McMahon, 133 U. S. 660, where the court says:

> "The power to tax belongs exclusively to the legislative branch of the Government, and *when the law provides for a mode of confirming or contesting the charge imposed, with such notice to the person as is appropriate to the nature of the case,* the assessment can not be said to deprive the owner of his property without due process of law."

No method is provided in the statutes in question here for contesting the charge imposed.

II.

The Assessment was a Taking of Private Property for Public Use Without Just Compensation.

As to the cost of the work. The statute of the District of Columbia under which the main in question was laid is an anomaly even among special assessment laws. In no other jurisdiction have we been able to discover a law which provides for an assessment without any reference to the cost of the improvement; hence, authority upon the direct point that nothing more than the actual cost can be assessed against the property owner, is difficult to find. What there is, however, when taken in connection with the obvious reason of the rule is conclusive.

The assessment for a local improvement must be limited to the cost.

> Cooley on Taxation, p. 462.
> Schenely *vs.* The Commonwealth, 36 Pa. St. 29–59.

"The assessment should be for no more than the fair and reasonable cost of the work."

> 25 Ency. of Law, 553.

(In the case at bar the cost was $1.50 per foot and the assessment $2.50 per foot.)

It should appear in the Record that the amounts assessed are no more than the value of the improvements.

> White *vs.* Saginaw, 67 Mich. 41.

And see the authorities collated in note to *Re Madeira Irrigation Dist., 14 L. R. An. 755.*

Any other doctrine will justify confiscation.

As suggested above, if one dollar per foot over and above the cost can be sanctioned, why not any amount?

As to the Assessment Being in Part for Public Purposes.

Assessments under the law, as made up of Secs. 199, 200, 201, 202, and 203, R. S. D. C., are unconstitutional and void, not only for the reasons given above as applicable to the Act of 1873, but because the law under which they are imposed provides for the levy on private property of a special assessment, part of which is to be devoted to the public use. Section 203 makes the fund available, not only for laying the mains, but for maintaining proper machinery and fixtures for distributing the water to the public.

> "When the work appears from the ordinance to be for the public convenience and benefit, a special assessment on abutting property cannot be maintained."
>
> City *vs.* Hughes, 1 Gill & J. (Md.) 480.
> Hammet *vs.* City, 65 Pa. 155.
> Also 48 Md. 198.
> 69 Pa. St. 352.

Under the statutes in question here a large part of the profits from these special assessments is employed for *public uses.*

The various purposes to which this surplus is applied is shown by the "Water Department" section of the annual appropriation acts of Congress for the District setting aside sums "to carry on the operation of the Water Department, and to be paid wholly from its revenues, namely."

Among the items which are thus paid for from these revenues, as shown by the Act of March 2, 1895, are superintendent of distribution branch, 5 clerks, 7 inspectors, messenger, draftsmen, foreman, timekeeper, tapper, assistant tapper, engineers, plumbers, property keeper, hostler, calker, etc.; in all $37,034; contingent expenses, including books, forage, etc., $2,500; interest, etc., $44,610; interest on Soldiers' Home reservoir, $2,581.66; sinking fund on reservoir debt, $5,745.02; interest on one-half cost of 48-inch main and

Fourteenth street mains, $7,812.09; and whatever may be available, after providing for the above, for the extension of the system of water distribution, including necessary lands buildings, machinery, mains and appurtenance.

Now as a matter of reason and justice, why should private citizens be compelled by means of exorbitant special assessments, to contribute to the maintenance of *public* works? These public improvements and expenses should be paid for from the general revenues of the municipality, toward which each and every citizen gives his share, or from the rentals exacted from those who use the water.

The Commissioners Without Jurisdiction.

The Act of 1873 provided that the "Board of Public Works shall determine whether water mains shall be laid, *on petition therefor.*"

There was no petition here.

The Act of Congress of June 17, 1890, gave jurisdiction to the Commissioners to lay water mains whenever in their opinion it was necessary for the public safety, comfort and health.

There was no such finding by the Commissioners; the nearest approach to it being the opinion of the Chief of the Fire Department that the main is necessary to public safety (Rec. 4.)

It is submitted that the judgment below should be reversed, and the assessment quashed.

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